



April 5, 2006

CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED DOCUMENT

TO: Michael L. Cervay, Director, Community Development & Planning

FROM: J. Rita McNeil, City Solicitor

COPIES: Margaret Wuerstle, Chief Planner

SUBJECT: Zoning Code – Definition of Public Nuisance

CPC ITEM #7

This memorandum is in response to your request, dated December 22, 2005, regarding “public nuisance” as it relates to the Cincinnati Zoning Code. Specifically, you requested that the Law Department provide either: 1) a definition of “public nuisance;” or 2) an explanation of why no definition should be included in the Zoning Code, with an amendment to the code to refer to other sections of the Cincinnati Municipal Code specifically regulating public nuisances.

“Public nuisance” appears in Section 1400-05(c) as follows:

Public Nuisance. Neither the provisions of this Chapter nor the approval of any permit authorized by the Cincinnati Zoning Code authorizes the maintenance of any public nuisance.

However, “public nuisance” is not defined in the Zoning Code. The purpose of Section 1400-05(c) is merely to provide notice to the public that using a property in a manner that is permitted under the Zoning Code will not be a defense to an action for maintaining a public nuisance. Under common law, the State of Ohio has the authority to abate public nuisances, which authority is extended to municipalities under the Home Rule provision of the Ohio Constitution. Under such provisions, a charter city may enact legislation authorizing any necessary abatement of public nuisances and the destruction of property used in maintaining such nuisances. *Solly v. Toledo*, 7 Ohio St.2d 16 (1966).

The current Zoning Code and the previous Zoning Code intentionally omitted the type of general definitions of “public nuisance” you requested because it was never the intention of the City to use the Zoning Code as a tool to regulate public nuisances. Instead, when City Council has determined it advisable, detailed provisions regulating specific types of nuisances have been included in different sections of the Cincinnati Municipal Code. Additionally, the strong possibility exists that if a definition of “public nuisance” is included in the Zoning Code, that Buildings and Inspections would become the arbiter of neighborhood disagreements.

The Solicitor’s Office additionally advises against amending Section 1400-05(c) to include references to all of the other provisions in the Cincinnati Municipal Code relating to public nuisances. A use that is permitted by the Zoning Code could nonetheless constitute a common law “public nuisance” that is not covered in the Municipal Code. If Section 1400-05(c) is limited to only those nuisances that appear elsewhere in the Municipal Code, the party maintaining the nuisance could use permissibility of use as a defense.

Conclusion

It is therefore recommended that a definition of public nuisance should not be included in the Zoning Code. Additionally, Section 1400-05(c) should not be amended to include existing public nuisance references in the Municipal Code. This will help to avoid unintended consequences regarding potential defenses to public nuisance violations under common law.

Assistant Solicitor Dotty Carman will continue to assist you regarding this matter, and can be reached at extension 1575.

S:\CARMAN\opinion - public nuisance.doc